LUND
UNIVERSITY

Department of Political Science

Master of European Affairs
Spring 2005
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Bargain down the Law

The Commission's method to ensure compliance with EC-law as bargaining or judicial procedure

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Abstract

The Commission initiated, in 2002 alone, over 2300 cases of alleged infringements of EC law under the general mechanism for supranational monitoring provided for in article 226 of the EC Treaty. Most cases were terminated before the formal infringement procedure started whereas some were taken all the way to the Court of Justice for a judicial solution.

One of the few theoretical accounts of the infringement procedure is based on this mix of political and judicial solutions and claims that the procedure can be described as "compliance bargaining" between the Commission and the Members of the EU. This approach developed through an assessment of the procedure in general. In this study it shall be tested on particular cases and challenged by a competing approach emphasising the judicial aspects of the procedure.

In all three cases studied, support for the Compliance bargaining approach is found. However, the approach's ability to explain the procedure and its outcome differs between the cases and in some instances the approach has problems explaining the Commission's behaviour. The study indicates that this is a result of a limitation in the Commission's ability to bargain when procedures take place against more than one Member State. Furthermore, the bilateral focus of the approach is claimed to be limiting in its explanatory power by excluding the domestic arena. Therefore, it is argued that two-level game theory can contribute to a theoretical development of the approach.

Key words: EU, compliance, bargaining, negotiations, two-level game theory, Commission, infringement procedure

Table of contents

1 Introduction

Research in Political Science is often focused on the decision-making phase. However, to attain the desired effect all decisions have to be put into operation i.e. be implemented. In the European Union (EU) many decisions on new legislation are taken supra- or internationally and implemented on the national level. The link to the supranational level, however, continues in the implementation phase through the Commission's supervision of national implementation. Although, the Commission, in 2002 alone, opened 2356 cases of alleged infringements of EC law[1] (European Commission 2002b Annex I p 3), little attention from political scientists has been given to this aspect of European Governance. The importance of monitoring is, however, increasing and the Commission has described it not only as a legal instrument but also as an instrument to achieve policy goals. (Commission 1988 p 5) In the White Paper on European Governance the Commission acknowledged monitoring to be "*an essential task for the Commission if it is to make the Union a reality for businesses and citizens*." (Commission 2001c p 25) In this study the manner by which the Commission undertakes this aspect of European Governance will be examined.

The task of supervising and enforcing legal compliance is often given to judicial bodies and the European Court of Justice's (ECJ) in enforcing EC-law must not be underestimated. (see Burley and Mattli 1993) The Commission, on the contrary, has a dual role not only in the sense of taking part in both decision-making and implementation but also in the both political and judicial role ascribed to it as "Guardian of the Treaty".

Political decisions are often compromises arrived at through bargaining and the EU has even been described as an "*integrated system of multi-level bargaining*". (Grande 1996) The Commission's monitoring style has also been described as a process of Compliance bargaining whereby an "*acceptable solution*" is sought. (Jönsson and Tallberg 1998) Judicial decisions, on the contrary, should optimally be arrived at through non-discriminatory application of the law, without resorting to bargaining. It is this apparent paradox in the role of the Commission of being both a political and judicial actor in the monitoring of Member State compliance that is the general problem-field of this study.

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[1] This paper will focus on the European Community (EC), which still constitutes a part of the EU. Since it is primarily within this pillar of the Union that binding law is made I will use the term EC-law and limit my study to the EC Treaty.

1.1 The infringement procedure

Among the tasks given to the Commission is, according to article 211 EC Treaty, to ensure the proper application of EC law. The general mechanism for fulfilling this task is described in article 226 EC Treaty, which reads:

> *"If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*
> *If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court."*

Since this procedure is the object of this study, I would like to give the reader an overview thereof before advancing further. I hope this will facilitate the understanding of the purpose and structure of this study.

1.1.1 Stages of the Procedure

The infringement procedure is often described as comprising different stages. (this description is based on Craig and de Búrca 2003 p 400-401) At the *informal stage* the Member State can explain its action and possibly satisfy the Commission before formal proceedings begin. Most cases come to the attention of the Commission either through a complaint by an individual or the Commission's own investigation of measures notified as national implementation of EC-law. It is usually the responsible Directorate-General (DG) that decides to initiate and undertakes the informal investigation. (interview Ström) As shown in Graph 1 (Appendix) most cases are opened as a result of an individual complaint. However, only 7% of the complaints reach the next stage of the procedure. (Commission 2002d p 13) The Member State often finds out that the Commission is interested in their legislation through an informal pre-226 letter of a fact-finding character. The Commission has shown interest in being able to move directly to the formal stages, without spending time at this informal stage, which is already done when a State has failed to notify its implementation measures. Sweden and other Member States considers the informal contacts important since at this stage, where the Commission is not fixed in its position, many issues can be explained, discussed and solved. (interview Ramstedt)

If no solution can be found at the informal stage the Member State will receive a *Formal Notice* from the Commission to which the State usually has two months to respond. This is the first stage of the formal procedure, which means that the decision to send the notice and subsequent documents is taken by the College of Commissioners after the DG and the Commission's Legal Service have given

their opinions. And it must be ensured that all actions are in accordance with good administrative behaviour. If the response to the Formal Notice entails a promise to change offending national legislations the College can, on the recommendation of the Legal Service and DG, suspend the case whilst awaiting these changes. (interview Ström)

If the Commission is not satisfied with the Member States' response or actions, it can issue a *Reasoned Opinion*. This Opinion sets the limits for the litigation that might follow and sets out a deadline of usually two months within which the Member States have to comply. To ensure that all Member States are treated equally, Officials at a DG need a permission from the College to discuss a case with a Member State after the Reasoned Opinion is sent. (interview Ström)

Fourthly, a *referral to the ECJ* can be made by the Commission. The Court then rules on the question whether or not the State was in breach of EC law when the deadline of the reasoned opinion expired.

Since the entry into force of the Maastricht Treaty a fifth stage can be added to the procedure. If the Member State does not comply with the judgement of the ECJ, the Commission can issue a new reasoned opinion and take the State to court a second time under article 228 EC Treaty. This time the Court has the power to impose a "fine" on the State. (Craig and de Bùrca, 2003, 402-403)

It is important to remember that most of the alleged infringements are solved early in the process, mostly before a formal procedure is started. (Graph 2, Appendix)

1.1.2 Development of the Procedure

Although the wording of article 226 has remained the same since the signing of the Treaty of Rome, there have been changes in the Commission's enforcement strategy. Until 1977 the infringement procedure was seen as highly political and even to instigate an investigation was considered an unfriendly act and all decisions were considered carefully. In 1977 the Commission reformed the procedure with the aim to depoliticise supervision. One step was to treat similar cases from different Member States as a "package" and be stricter in the equal treatment of Members. (Audretsch 1986 p 279-289; for a discussion see Mendrinou 1996)

To structure the approach towards infringement proceedings further, an annual report on monitoring been published since 1983. A number of smaller reforms were initiated during the mid 80's and early 90's and attempts were made to tighten and expedite the procedure and focus on selected areas. (Tallberg 1999 p 139) For example if Member States did not notify national implementing measures the Commission would immediately start a proceeding. (Craig and de Bùrca 2003 p 411)

A second larger reform occurred in 1996. The reform included a more outspoken selectivity among the cases with emphasis on directives not implemented at all. (Tallberg 1999 p 140) Furthermore, the internal deadlines were changed so that decisions to initiate formal proceedings were to be taken

within a year from a complaint, thereby shortening the informal process. (Ibáñez 1998 at 2.1.2.2)

In the White Paper on European Governance the Commission emphasised the importance of individual complaints but also that the infringement procedure is not the most efficient way to remedy. Regarding its methods it is held that: "*the Commission will continue to pursue an active dialogue with the Member States on enforcement. This has the advantage of improving feedback on how rules are applied in practice. It also can lead to a faster resolution of a potential infringement than a full court case* […]" (Commission 2001c p 25-26)

So-called package meetings have been held since the late 1980's to facilitate the dialogue between the parties. (Jönsson and Tallberg 2004 p 152) During these meetings officials from one Member State meet their counterparts at the Commission to discuss a number of related issues. A Swedish Official, responsible for the meetings, regards them as fruitful since they can help the Commission to terminate cases before the formal procedure has started. The discussions often focus on explaining the situation and how the Member State can act to avoid problems. (interview Kruse) The Commission's aim with the meetings is to find solutions outside legal proceedings. (Commission 2002d p 7)

In 2002 rules regarding complaints were codified, including rules on communication, openness and the one year-deadline for initiating a proceeding. However, this does, according to the Commission, not alter the bilateral character of the procedure by giving individuals standing as a party. (Commission 2002a p 2) There are no binding rules of procedure regarding article 226 but internal guidelines has been developed including deadlines as to how soon after a decision in the College the Formal Notice or Reasoned Opinion shall be sent. However, the Commission has had problems following these guidelines. (Ibáñez 1998 at 2.1.2.2)

The only major change in the unratified Treaty establishing a Constitution for Europe is that the Commission is given the possibility of proposing a "fine" already in the first referral to the ECJ if the Member State has failed to notify its implementation measures. (article III-267)

1.2 Previous Research

As already stated not much attention from political scientists has been given to the Commissions role in ensuring compliance with EC-laws. However, within Regime-theory a lot of attention has recently been given to efficiency of international regimes and how to best ensure compliance.[2] Against the "enforcement school", based on traditional realist theory holding that a state will

[2] Raustiala and David make a distinction between legal *compliance* with a commitment and *effectiveness* meaning the extent to which the commitment has actually changed the behaviour of a state. (1998, 661) This paper is mainly about compliance in their terminology.

only comply when the cost of compliance is lower than the cost of non-compliance (see Underdal 1998 p 7-12), a "management school" has developed. This school sees different reasons for non-compliance, such as capacity limitations and ambiguous Treaty obligations, which necessitates problem-solving solutions rather than sanctions. (Levy et al 1993 p 406-408; Chayes and Chayes 1995 p 10-15; for a critique see Downs et al 1996)

Partly as an attempt to bridge the divide between realism and liberalism on international regimes, which in my opinion is simillar to the enforcement-management divide, Jönsson and Tallberg have developed a Compliance bargaining approach. By this "new" phenomenon of international relations the authors understand *"a process of bargaining between the signatories to an agreement already concluded, or between the signatories and the international institution governing the agreement, which pertains to the terms and obligations of this agreement*". (1998 p 372 and 398) Compliance bargaining takes different forms in different regimes and the approach will be described and tested below in the context of the EU. The added value of this approach is that bargaining power can be used as a tool to explain the strength of international law and account for the dynamics and outcomes of the compliance process. (Jönsson and Tallberg 1998 p 398-9) Spector et al have taken a similar approach in a recent anthology on the importance of "postagreement negotiations" for regime development. (2003)

Tallberg has elsewhere described enforcement in the EU arguing that both management and enforcement strategies are present and necessary in the EU. (2002 p 632) His doctorial thesis gives one of few accounts by political scientists of the infringement procedure through applying Principal-Agent theory developed to include a "Supervisor" to describe the Commission's role. The infringement procedure is one possible case of the Commission enhancing its powers against the Member State's will by taking a more strict approach to enforcement. However, Tallberg's finding is that the Member States agreed to these changes. (1999 p 153)

Much of the work touching on the implementation procedure has been a debate regarding whether or not there exists a systematic "implementation deficit" in the EU (From and Stava 1993; Krislov et al 1986; Börsel 2001). Sverdrup's finding, based on a quantitative study, is that the deficit has been reduced over time. There is however a difference between the South and North regarding at what stage an infringement proceeding is solved. This he explains by the Nordic countries' tradition of consensus seeking. (2004; see also Mendrinou 1996 and Haas 1998)

One of the most frequently addressed questions on the topic by legal scholars is the extent of the Commission's discretion at different stages of the procedure. There seems to be agreement that the discretion is vast but still limited by an obligation to ensure compliance. Also, there is less discretion regarding whether or not to initiate proceedings than to proceed with the case. (Audretsch, 1986; Evans 1979; Snyder 1993 and Dashwood and White 1989) The most recent

comprehensive account of article 226 EC is by Ibáñez, who inter alia argues that the Commission needs more comprehensive procedural rules. (1998 at 2.1-2.2)

1.3 Purpose of the study

The infringement procedure is on the surface a formal legal procedure ending with litigation. Yet it has been described as a process of bargaining and even used to develop the Compliance bargaining approach to international regimes. Held as an "excellent example" of compliance bargaining (Jönsson and Tallberg 1998 p 388) it is important for the approach that the procedure actually can be seen as bargaining. Also for the understanding of the relationship between Member States and the Commission and to explain the both legal and political role given to the Commission in infringement procedure, it is of importance to see if this description is empirically correct. Thus, the primary question this study sets to answer is "theory-testing":

Can individual infringement proceedings initiated by the Commission against Member States under article 226 be described as Compliance bargaining as proposed by Jönsson and Tallberg?

Even if Tallberg in another context acknowledges the importance of both sub-national legislative bodies and pressure from interest groups for the government's abilities and preferences to comply (2002 p 626-632), Jönsson and Tallberg holds that the infringement procedure "is essentially bilateral" with the Commission and Member State as the "two exclusive parties". (2004 p 148) Spector on the other hand sees the multilevel character as distinguishing for postagreement bargaining. (2003 p 57) The connection between international and domestic arenas has also been emphasised in numerous studies of the EU (see Hooghe and Marks 2001). If the infringement procedure is a bargaining process, this bargaining might affect and be affected by bargaining on the domestic level. While testing the bargaining approach I will therefore try to develop it through combining it with two-level game theory. My secondary question is:

Can Two-level game theory help to explain the outcome of infringement proceedings seen as a bargaining process and, if so, how can the compliance bargaining approach be developed from this?

1.4 Structure of the study

My questions are to be answered through looking at three individual infringement proceedings. In the next section this method is discussed as well as problems faced in the research-process. In chapter 2 I present Compliance bargaining and two-level game theory. Focus is put on the first against which an alternative approach is developed. In the following three chapters the cases are closely described and analysed. In a concluding chapter the overall findings are discussed and feedback given to the theoretical starting points of the study.

1.5 Method and Material

All research should in my opinion be based upon previous research, but not be limited by it. My choice to conduct case studies has to be seen in light of this. Previous research on compliance in the EU, including Jönsson and Tallberg's development of the Compliance bargaining approach, has been descriptions of the procedure in general, often based on statistics. There is to my knowledge no study looking at specific cases of how the infringement procedure is being used.[3] Both to test and develop theory I hold case studies to be a good and necessary complement to more general studies.

The relationship between theory and the empirical material is slightly different in my two questions. Regarding the first theory-testing question my approach is close to what Eckstein calls a disciplined-configurative study but with a clear theoretical aim. From the already developed approach I will formulate propositions contained therein and use these to interpret the cases. This deductive design can, according to Eckstein, in ideal cases "*show that valid theory compels a particular case interpretation and rules out others*." (1975 p 103) I do not hold that the theory has to *compel* a certain interpretation in all cases to be valid and it is thus not possible to falsify it through a small number of cases. However, if the propositions drawn from the Compliance bargaining approach are found to describe the empirical material correctly this will strengthen its validity. If not this can point to weaknesses that have to be addressed if the approach should not be rejected.

Regarding the theory-developing part, the cases are used more as a plausibility probe to find out if this is a fruitful way of explaining infringement procedures and thereby giving feedback to the theorizing about Compliance. (cf Eckstein 1975 p 112)

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[3] Here, the seminal study on implementation in the EC edited by Sidentopf and Ziller (1988). However, they do not give the infringement procedure much attention in their case-studies on implementation and their conclusions about the Commission's politically biased approach seem empirically unfounded. (see Vol. I p 111)

1.5.1 Selection of Cases

The most useful case studies for a theory test are the ones where the cases studied are somehow critical to the theory. Therefore the choice of cases is crucial. (Eckstein 1975 p 113) What makes a case critical depends on the theory and I will return to this in relation to the Compliance bargaining approach below. My selection process had four stages.

Firstly, I selected about twenty cases against Sweden differentiating in the factors known from the three most resent annual reports on the monitoring of EC law (Commission 2001b, 2002b and 2003b). These factors included speediness of procedure; stage reached when terminated; type of breach (i.e. Failure to notify national implementation measures; Infringement of Treaties, Regulations and Decisions and; non-conformity and incorrect application of directives)

Secondly, I asked the Swedish Foreign Ministry for the written material in eleven of these cases, selected on the basis of additional information from press releases and media reports. I did not continue working with cases where no information was found or it was apparent that no real conflict was at hand. This was often the case for procedures based on non-notification and those terminated at the early stages.

Thirdly, I selected seven cases and tried to arrange interviews with responsible officials. This selection was based on official material and the fact that not all material was available in some cases.

Fourthly, I learned that it was hard to find people interested or able to comment on cases that did were solved early on. Moreover, in some cases it was not possible to identify who had worked with the case. This finally led me to choose three cases in which I could conduct interviews. The cases I finally decided to work with are the Bathing water- (case number 99/2142), the Habitat - (98/2233) and the Wine taxation-case (99/4452).

The selection can be criticized for being more dependent on available material than the traits of the cases, to which I partly agree. I was however forced to work with cases where material could be found more easily given the temporal constraints.

The main criticism of the selection should be that all three cases were referred to the ECJ. However, it is also this factor that makes them critical. Being solved by a judicial actor rather than through bargaining makes them difficult cases to explain for the Bargaining approach. They also have the advantage of having moved through all stages of the procedure, making it possible to see if the approach better explains the procedure during some of the stages.

I have chosen to work with three cases instead of one single case to decrease the risk of looking at one potentially misleading case. This also has the advantage of making comparisons between the cases possible.

1.5.2 Generalisations

Can findings from cases going to court be generalised to other cases? As we shall see the Compliance bargaining approach does not argue that all cases are solved through bargaining. Rather, the possibility of litigation is an important part of the Bargaining process. Furthermore, if there is something inherent in cases referred to court making them unexplainable by the approach this would limit its general scope. It has to be remembered that I seek to generalise from the cases to the theoretical propositions – not to the population of all infringement cases. (see Yin 1989 p 21)

The Compliance bargaining approach is developed to describe all international regimes. However, my study only seeks to test it regarding one, the EU. My results cannot be generalised to other regimes, but it is important for the approach as such that it is able to explain particular infringement proceedings since this is the context in which it was developed.

1.5.3 Material

The basic material for the case studies has been the written communications between the Government Office in Sweden and the Commission.[4] Furthermore, I have used newspaper reports from Swedish media,[5] the Commission's press releases and Official documentation[6] such as preparatory works. The media reports have been useful to understand the context of the procedure and the opinion of different actors involved. It is however important to separate what is said in the formal procedure and in media since the audience is very different.

The seven interviews conducted have been a crucial part of this study. The position of the persons interviewed in relation to the case and the aim and form of the interview is described in the references list. I have contacted people in Brussels, who according to my contacts in Sweden were involved in the cases, but most requests have remained unanswered. I have unfortunately only interviewed one Official at the Commission. To hear only "one side" is naturally a weakness in the material.

Quotations of Swedish sources are made through my translation to English with the original given in notes when deemed important.

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[4] References to this material supplied by the Ministry of Foreign Affairs, is made by the Documents official number, or when this is not available the date of the document. For further information see the reference.
[5] References by author and the exact date of publication
[6] Official material from Sweden is referred to by origin (in English) and type of document according to the in Sweden accepted abbreviation incl. year and number whereas document from the Commission only by year.

1.5.4 Delimitations of the Study

Given that general studies have been conducted regarding the procedure I will focus my study on the particular cases. Above I have given an introduction to the procedure in general to facilitate for the reader. This, and especially the development of the procedure, is interesting for my questions but falls outside the scope of this study. As with all research my study has to be seen in relation to previous studies, especially Jönsson and Tallberg's work.

The study is also limited to cases against Sweden. According to Sverdrup, the Nordic countries have a more consensus seeking approach to compliance (2004 p 39), which would make bargaining more probable. The results might therefore to some extent be limited to the Nordic context.

It is moreover not my intention to give a review of the legal problems in the cases – only the process of solving these.

2 Theory

To be able to test and develop the compliance bargaining approach, I will in this chapter discuss it thoroughly. Against this theoretical approach I will develop a competing approach. By utilizing the general writing on compliance bargaining and its application to the EU I will draw propositions that can be applied to particular cases and do the same regarding the competing approach. The empirical material will be analysed from these competing propositions. If, as discussed above, the propositions are valid descriptions of the empirical material this would indicate that the theoretical approach is valid. However, to draw this conclusion the propositions have to be correct and logical consequences of the general theory. At the same time it is important that they make the general approach operational i.e. applicable to particular cases.

It could be that neither of the approaches describes the cases properly and that a third alternative should be developed. It is, however, not my intention to develop such an alternative in this paper, although my findings might help to do so by pointing to weaknesses in existing theories.

An introduction to two-level game theory where the basic theoretical concepts that could be applied to the infringement procedure is elaborated on will also be given.

2.1 The Compliance bargaining approach

One first defining characteristic of the concept of negotiation is the presence of both different and shared interest. Fischer and Ury define negotiations as "*back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed*". (1981 p xi) Iklé sees negotiations as the "*realization of a common interest where conflicting interests are present*." (1964 p 3) Similarly, Jönsson and Tallberg hold that bargaining is by definition a process of "give and take". (2004 p 161) and requires a "*zone of acceptance*" where both parties can find an acceptable solution (1998 p 391)

An infringement proceeding starts when the Commission considers a Member State to be in breach of its obligations. If the Member State holds that the Commission's standpoint is based on misunderstandings or misinterpretations of law or it agrees but does not change, a conflict is present. Concerning common interests, Jönsson and Tallberg holds that there is a mutual interest in finding an "*amicable solution*" as early as possible in the process. The Member States have a desire to be perceived as cooperative partners by the other Member States (1998 p

391-392) and thus avoid attracting more publicity to their breach of EC law and a court-case against them. (Tallberg 2002 p 617) For the Commission the benefits of avoiding a lengthy process is, firstly, that their resources are limited and they are not able to litigate in all cases. Secondly, in its role as policy initiator the Commission is dependent on a good relationship with the Member States. A harsh approach against infringements might reduce the hospitability towards Commission proposals in the decision-making phase. (Jönsson and Tallberg 1998 392) The need for future cooperation can in this way cast a shadow over the proceedings. (cf Axelrod 1984 p 13)

A second characteristic of negotiation is, according to Hopmann, the interdependence in decision-making between the parties. In a negotiation process neither of the parties have full control over the outcome. (1998 p 26) It is the Commission alone who decides when the case is initiated and proceeds. Member States, on the other hand, have full control over the decision if, when and how to comply with the Commission's opinion. (Jönsson and Tallberg 1998 p 393-4) Both are therefore dependent on the other's decisions.

As Jönsson and Tallberg observes the compliance bargaining takes place in "*the shadow of the law*" where litigation creates an alternative to a negotiated solution (2004 p 143; for discussion see Cooter et al 1982) This means that the Best Alternative To a Negotiated Agreement (BATNA) against which compliance has to be weighed is always a risk of a Court referral for the Member State. (cf Fisher and Ury 1981 p 101-111)

So far I have used the concepts *bargaining* and *negotiation* interchangeably. Jönsson and Tallberg make a distinction between the two concepts. By using bargaining they wish to include not only formal and direct verbal communication i.e. negotiations between the parties but also indirect and non-verbal communications. (1998 p 378) This broad concept has to be kept in mind in when conducting the empirical study. Furthermore, from this general description of bargaining as a process of communication we can draw two propositions (P1-2 on page 15).

The outcome of compliance bargaining, like other types of bargaining, depends upon the distribution and use of bargaining power between the two parties. In the type of compliance bargaining that Jönsson and Tallberg claim is present in the infringement proceedings *behavioural-* is deemed more important than *structural* power, i.e. positions vis-à-vis the other, capabilities and resources are less important than the tactics employed by the actor. (1998 p 381) Power in compliance bargaining is related to the parties' relative (a) control over the interpretation of law; (b) command of the procedure and; (c) the capacity to shape cooperative outcomes. (Jönsson and Tallberg 2004 p 154)

The Commission's bargaining power takes four expressions. First, control over the procedure gives the Commission bargaining power due to the increased cost of non-compliance felt by Member States as the case proceeds. The Commission has something to "offer" by not advancing the case. Secondly, approximately, 90% of cases that reach the Court are ruled in favour of the Commission enhancing their power to make authoritative interpretations. Thirdly,

the option to propose a penalty in a second process gives the Commission enhanced powers. Fourthly, the Commission has been given the role of "Guardian of the Treaty" by the Member States and can thus present itself as bound by EC law. This gives them a firm negotiating position, narrowing the zone of possible agreement to their advantage. (Jönsson and Tallberg 1998 p 394)

Member State's bargaining power depends to a large degree upon the weakness of the Commission's overall position. Firstly, the authority of the Commission is dependent on the Member States as "Masters of the Treaty". Collectively they could change the infringement procedure. Secondly, Member States can count on the Commission's desire to remain on friendly terms with them due to their important role in the decision-making phase. Thirdly, the Commission as a primarily political body will consider some compliance better than none and thus be flexible and find "*acceptable solutions*" to avoid a total neglect of Community law. Finally, the unilateral control over the decision to comply equips the Member States with power in the process. (Jönsson and Tallberg 1998 p 394)

If the procedure can be described as bargaining it is likely that the parties will use these powers. Therefore, four additional propositions can be drawn from this (P3-6 on page 15).

2.2 The Judicial approach

Both in international relations (Goldstein et al 2000) and domestic politics (Vallinder 1995) political scientists have noted a "judicialization" of politics. Vallinder holds that this includes the spread of judicial decision-making methods. Comparing the judicial method to the legislator's (political) method he holds that whereas the later works with bargaining, compromises and logrolling to find "*the politically possible solution*" the former is more transparent and impartial with the aim of finding "*the only correct solution*". (1995 p 13-15)

According to Jönsson and Tallberg the presence of bargaining is dependent on the discretion of the Commission to commence and further a case to the extent that "*had the discretion of the Commission been very limited, or even non-existing, there would have been little scope for bargaining*". (2004 p 156) Legal scholars agree that the EC Treaty gives Commission large discretion. (cf above at 1.1.2) However, for our purpose it is more interesting to see how this discretion can be used. My alternative approach is thus based on the extent to which the Commission is limited by others or by its own choice in their discretion to find the "*correct solution*" and the consequences of this.

For Rawlings, the infringement procedure has three "faces". Apart from the elite regulatory bargaining, which is similar to the compliance bargaining model, the procedure entails a citizen's and a technocratic side. (Rawlings 2000 p 9-10) Under the rubric of a "judicial approach" I will present how these two "faces" can put pressure on the Commission limiting its ability to "give and take" in a bargaining.

2.2.1 Citizen's influence

Due to their limited resources the Commission has become largely dependent on individual complaints to detect Member State's infringements (see Graph 1). According to the European Ombudsman individuals have two main interests in seeing that the infringement procedure follows the rule of law: (i) it is the only way to sanction infringement where there is no right of an individual attached to the obligation and; (ii) citizens are entitled to expect that the Commission fulfils its obligation as Guardian of the Treaty. (Söderman 1998 p 17) The expectations of individuals have sometimes been disappointed by the Commission, which has led to a number of complaints to the European Ombudsman. By looking at these cases it is possible to see what kind of pressures on the Commission arise from individual complainants.

Many of the complaints to the Ombudsman entail demands for limits on the Commission's discretion, more information about actions taken and an observation of time limits. (See inter alia European Ombudsman 1997 p 65; 2001 p 39 and 2004 p 152) The Ombudsman has made critical remarks about the decision-making in the Commission stating in one case that "*the Commission should work in accordance with principles of good administration and act with due diligence*." (European Ombudsman 1999 p 212) The Ombudsman has even assessed the accuracy of the Commission's interpretation of EC-law, however not found it unreasonable. (European Ombudsman 2003 p 168-169)

In short, the citizen's role in the procedure has created pressure for accessibility, transparency, due process and timeliness, challenging the flexibility of the Commission. (cf Rawlings 2000 p 8)

2.2.2 Technocratic enforcement

The "technocratic face" of proceedings involves streamlining of the procedure, focus on efficiency and a more formalized and routine-based application of the rules. Such tendencies include a firmer approach by the Commission leaving less room to rest on a case, for compromises with time limits for Member States and country specific solutions. Contrary to the bargaining approach this would emphasise the importance of starting the more formal procedure as soon as possible and to move to the next stage promptly to reduce the time for handling of cases. (Rawlings 2000 p 21-22)

2.3 Competing propositions

One problem in the operationalisation of the approaches is that the Bargaining approach does not preclude that the Commission acts in accordance with the judicial approach when this will further the process of implementation. Therefore some of the Judicial- but not the Bargaining propositions have been formulated to

compel a certain interpretation (cf above at 1.5) by excluding all bargaining behaviour. The Judicial approach is developed only as a support in the testing of the Bargaining approach. If its propositions cannot explain a case that the Bargaining approach can explain, this will support the later. The propositions for the both approaches that will be the tested empirically are:

	Compliance bargaining	**Judicial approach**
P1	The Commission is likely to be interested not only in the result of national implementation but also in the quality of the process of implementation and Member States' problems since they are dependent on their actions.	The Commission will only be interested in the actual result of implementation measures.
P2	The process is likely to contain more communication than the strictly formal communication foreseen in Treaty i.e. the Formal Notice and Reasoned Opinion.	The process will not contain more communication than is formally required.
P3	The Commission will be flexible in offering Member States more time to comply and a decision to proceed will be made only if the time is appropriate to get closer to a solution.	The Commission will proceed speedily and even when Member States make credible statements that they are to comply.
P4	How bargaining powers are used most efficiently is likely to differ between Member States and the Commission is thus likely to open up for country-specific solutions.	The Commission will treat all States in the same manner and act the same way towards them.
P5	Flexibility regarding the scope of obligations under EC law can open up for "acceptable solutions", although the Commission's bargaining position might be firm.	The Commission cannot be flexible regarding the obligations arising from EC law.
P6	The behaviour of a party in an infringement procedure can be linked to the relationship between the parties and other issues e.g. to ensure support for proposed legislation.	Infringement proceedings are not linked to other issues.

The Bargaining approach's propositions are as seen related by referring to the process, means as well as communication of the "give and take" of bargaining. These propositions have guided the empirical research and will be refereed to (P1 etc) in the analysis of the three case studies to facilitate for the reader.

2.4 Two-level game theory

The concept of two-level games has been developed by Putnam as a metaphor of the interactions between the domestic- and international level in negotiations. For explanatory purposes Putnam describes the negotiation process as two stages. First, bargaining takes place at the international level (Level I) between negotiators. Then, negotiations take place at the domestic level (Level II) about whether or not to ratify the agreement from Level I. In reality the two stages do not appear in this strict temporal order. (1988 p 433-5)

In this paper the negotiations between the Commission and Sweden constitutes Level I, and the implementation in Sweden Level II. The "negotiator" is the Swedish government. It would be interesting and indeed elegant for the study to also study the Commission's relationship to its constituency (complainants, DGs or Member States). However, I do not consider this to be a Level II constituency in the sense given by Putnam. What the two-level game theory can contribute to this study is a way of understanding how the government can use the negotiations at one level to affect the other level and the possibility of agreement. I will not give a comprehensive presentation of all hypotheses possible to draw from Putnam's metaphor but only present those concepts possible to apply to the situation in this study.

The critical link between the two levels is the ratification. Putnam gives this term a broad meaning letting it refer to "*any decision-process at Level II that is required to endorse or implement a Level I agreement whether formally or informally*." (1988 p 436) The important implication of ratification is that all Level I agreements must have enough support at Level II of all involved international parties to be ratified. Putnam refers to all international agreements that would be ratified domestically as the "win-set" of that State. A larger win-set makes agreement more likely, since it is more probable that the win-sets of the parties overlap. However, the relative size of a negotiator's win-set can also affects the distributional outcome internationally.[7] The size of the "win-set" depends, on domestic coalitions, power distribution and preferences of the Level II constituency, the institutional design of the ratification procedure and the Level I negotiator's strategy. (Putnam 1988 p 437-442)

An important phenomenon of two level games is that the international level can be used to trigger domestic actions that would otherwise not materialize, a strategy referred to as "*synergy*". By "synergistic issue linkage", the linking of an attractive international agreement to domestic action, the negotiator can gain support on the domestic level. The international agreement can also be used to change the domestic rules of ratification towards giving more control to the negotiator over the final outcome. (Moravcsik 1993 p 24-6)

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[7] C.f. the necessary criteria of a contract zone of possible agreement referred to above.

A negotiator can also use domestic politics at the international level. The fact that his constituency has tied his hands to one outcome will increase his bargaining power since he can credibly not be pushed around. Empirical studies have however shown that it is inefficient to try to tie one's hands and the method is not used frequently. (Evans 1993 p 399) Alternatively, he can try a "cutting slack strategy" whereby he tries to increase his freedom to find an agreement by decreasing the domestic constraints. (Moravcsik 1993 p 27-29)

I will now turn to the empirical part of the study where the theoretical approaches presented in this part will be applied to each of the three cases.

3 The Bathing water directive

The Bathing water directive aims at protecting public health by ensuring that minimum quality criteria for bathing water are met throughout the Union. Introduced in 1975 it gave the Member States ten years to ensure that the bathing water satisfies the binding criteria on a number of parameters. The directive also requires Member States to monitor the water quality regularly and send annual reports to the Commission. (Council Directive 76/160/EEC) These reports are published on Internet and frequently documented in the media. (see Nilsson, 26.5.99)

Already in 1994 the Commission started to look over the Directive and in 2002 a new directive was proposed (Commission 2002c) on which a common position between the Council and European Parliament was adopted in January 2005. (Internet: Commission, Pre-Lex, 19.4.05)

3.1 Initiation of the procedure

The infringement procedure against Sweden started in August 1999 with a Formal Notice from of the Commission and the issue had not been raised in informal contacts prior to this. (interview Abresparr). The Commission initiated the case on its own motion based on the facts from the annual reports as part of a horizontal approach against five Member States. (Commission 1999) The Commission held that at a large number of locations the water did not satisfy the binding quality-criteria in the directive and that Sweden did not sample the bathing water as frequently as the binding rules prescribed. With regard to both points the Commission refer to the annual reports for 1995 to 1998 and claims that the Swedish government been in breach for the last four years. (Doc. SG(99)D/6143)

A possible explanation of the Commission's interest in the issue at this time could be that the ECJ in June of the same year gave judgement in a case against Germany. (ECJ, C-198/97) In this case the Court ruled in favour of the Commission on both questions of frequency of sampling and quality. Importantly, the Court held that even if the short bathing season in Northern Europe gives individual samples disproportional weight this could not be taken into account.

3.2 Formal phase

In the Swedish response to the Formal Notice the government admitted that the frequency of samples is not in conformity with EC-law but holds that the quality of water was good. This was due to administrative problems and because the municipalities, in charge of conducting the tests, might have more information about the local circumstances and therefore considered tests unnecessary where they knew the quality was good or that nobody would bathe. To cure the problems the government gave the Environmental Protection Agency[8] (EPA) the task of developing a plan of action to be presented by March 2000, identifying the necessary measures to fulfil the obligations. The response was also used to complain about the inflexibility of the Directive and references were made to the work of the Commission towards a new proposal and how this should be designed. (Doc. EUM1999/2532/R)

Two and a half months after the Swedish response the Commission moved by sending a Reasoned Opinion based upon the same grounds as the Formal Notice. At the same time action was taken against three other States. (Commission 2000a) Although the Commission welcomed the Swedish decision to take action these measures had not yet been executed and Sweden was thus considered to still be in breach of the Directive. Furthermore, "for clarity" the Commission underlined that failure to fulfil obligations cannot be justified on the ground that new Community legislation is under preparation. Sweden was therefore given two months to take necessary action to improve the quality of its bathing water. (Doc. SG(2000) D/100855) Swedish Officials commented that they feel that their counterparts in DG Environment hold infringement proceedings and new legislation to be separate questions. (interview Abresparr and Blücher)

Sweden responded to the Reasoned Opinion in two letters. In the first letter, dated within the dead line, Sweden restated the opinion that the water is of good quality. Furthermore, the government presented three of the actions the EPA considers. (Doc. 17.3.00) The second letter presents EPA's plan and notes that the government had started the legislative process to make the necessary changes and this legislative process was to be finished during the fall 2000. (Doc. 26.5.00)

3.3 Referral to the European Court of Justice

The Commission decided, on 27th of July, not to wait for the enactment of the Swedish legislation and instead referred the case to the ECJ. On this a Swedish Official commented that the Commission might think that the work will be faster if they go to Court, but in fact it takes longer since they have to concentrate on

[8] Naturvårdsverket

bureaucratic formalities. (interview Abresparr) The decision was also part of a horizontal action against another two Member States. (Commission 2000b)

In its defence Sweden conceded that it was in breach, but emphasised that samples taken in 1999 and 2000 showed a good water quality. (Doc. 19.12.00) The Court, therefore, ruled in favour of the Commission holding that Sweden had failed to take all necessary measures to ensure compliance and thus had failed to fulfil its obligations. (ECJ, C-368/00)

3.4 Article 228 procedure

In the report for the season 2001 Wallström, the responsible Commissioner, held that an "unacceptable" large number of locations were not tested frequently enough. (Engström, 30.5.02) Therefore, after letting the matter rest for more than a year the Commission in an informal letter asked what actions had been taken to comply with the judgement and in January 2003 issued a Formal Notice under article 228 reminding Sweden that this procedure could end with a pecuniary punishment. (Doc. SG(2002)D/221034)

Sweden took a legal approach in its response holding that it was not in breach of the judgement since it was not at the same locations as before that breaches occur. Furthermore, Sweden explained the problems it had during the 2001 season with inter alia malfunctioning computer systems and misunderstandings on the municipal level and referring again to the proposed Directive. (Doc. EUM2002/1382/R)

As of today, the Commission has not referred the case to the ECJ a second time. Through contacts between Swedish and Commission Officials in other related issues "rumours" have reached the Government Office that the Commission is awaiting the next annual report before deciding whether or not to refer the matter to the ECJ. (interview Blücher)

3.5 The role of Municipalities

As noted above it is the Municipalities who are responsible for sampling the bathing water in Sweden. This put the Government in a position where it did not have the "key to compliance" in their own hands, while still being responsible towards the Commission. (interview Blücher) In May 2000 Kjell Larsson, Minister of Environment, sent a letter to all non-complying municipalities to highlight the importance of the samples. The Minister's position is that "[o]*nly through observing the rules in force can a small country act with credibility in the*

EU"[9] and referred specially to the environmental field. (Doc. M2000/1465/R) By addressing the issue in interviews many Municipalities highlighted the costs and their feeling that the samples are unnecessary since the public do not care about them as reasons for non-compliance. (Ovander, 29.7.00; Bäck 29.7.00) Many municipalities demanded that the rules be changed since they do not take Swedish conditions into account. (Lindgren, 31.5.00) That the problem is on municipal level is, however, something the Commission did not take into account (interview Abresparr)

3.6 Analysis

The conflict in the case was not about the interpretation of law, but rather the time Sweden should have at its disposal to implement it correctly. This together with the judgement in favour of the Commission's strict interpretation of the Directive makes its fixed position regarding the scope of the obligations less relevant (P5).

Throughout the infringement proceedings, Sweden referred to the work on a new Bathing water directive. (P6) The Commission, however, constantly held that this could not be taken into account. Moreover, the Commission did not take the specific technical problems or the problems for the Government of not controlling the measures at municipal level into account. The continual focus for the Commission was the results in the annual report i.e. the outcome not the process or specific Swedish problems. (P1 and 4)

To the obvious dissatisfaction of Sweden, the Commission was not flexible in giving Sweden more time, neither to present its legislative proposals nor to implement the legislation already decided upon. It is, however, important to note that the Commission did not proceed with the infringements dating back to 1995 until 1999 and the temporal connection to the judgement against Germany indicates that the Commission waited until the time was suitable to initiate the proceeding. Once formally initiating the procedure the Commission acted speedily until after the first judgement where there seem to be a greater reluctance to proceed. That the quasi-criminal article 228 litigation more severely affects the relationship with the Member State could explain the Commission's behaviour from a Bargaining approach. (P3) The lack of flexibility could be explained by the fact that the Commission is acting towards a number of States simultaneously and wish to treat them equally precluding country specific bargaining solutions. (P4)

Basing its arguments on the annual reports there was less need of informal contacts before the Formal Notice was sent. The publishing of annual reports, putting pressure on the Government through media without a formal procedure being started, is however a form of additional communication strengthening the compliance bargaining approach. Even if Swedish politicians are sensitive to

[9] "Enbart genom att iaktta de regler som gäller kan ett litet land agera med trovärdighet i EU-arbetet."

criticism regarding the environment (interview Blücher) this criticism seems to be turned back towards the EU via criticism of the Directive's inflexibility. Direct contacts related to the procedure are limited to fact-finding letters once the formal procedure was initiated but the case shows that infringement proceedings are informally discussed in relation to other issues. (P2)

Overall, the Commission appeared to be formal in its handling of the case once the proceeding were opened. Especially as time was not given to let the measures already decided on enter into force speaks against the Bargaining approach. The Commission appears to be unwilling to 'give' something for an amicable solution, even where this is easy and not far-reaching. What supports the Bargaining approach, is the flexibility and the alternative source of pressure through media before 1999 and the reluctance and apparent flexibility regarding the article 228 procedures, informally communicated to Sweden.

Regarding two-level game theory, the Swedish government tried both to influence the international level through referring to the domestic and vice versa. The Government signalled its inability to act since the question is out of its control in the hands of the municipalities i.e. that its hands were tied and therefore it needed more time. This strategy was, however, unsuccessful. Towards the municipalities, the government tried to increase the willingness to comply through referring to the importance for Sweden and the further environmental cooperation within the EU. The unattractive action at the sub-national level was thus connected to the attractive objective of more cooperation within this field, which can be described as an instance of synergistic issue linkage.

4 The Habitats Directive

The Habitats Directive (Council Directive 92/43/EEC) is aimed at maintaining biodiversity in the Member States primarily by creating a network of special areas of conservation. The Member States shall report which areas are to be classified as protected and has a responsibility to take all necessary measures to protect these. Furthermore, the Member States must ensure a strict protection of animals and plants listed in Annexes to the Directive. The Directive from 1992 was to be implemented in national law within two years.

4.1 Initiation of the procedure

The directive was first discussed at a package meeting in 1996 where Sweden held that it had completed the implementation through the measures reported to the Commission. At a second meeting in 1998 the conformity of the Swedish laws with EC law was discussed and following this meeting more information about Swedish legislation was sent to the Commission. The Commission's opinion was that the Swedish law did not ensure the protection demanded by the Directive since there was room for derogations from the Directive in the application by national authorities. (Doc. SG(99)D/8646) The Swedish legislation was deemed "confusing" and the reported measures did not fully implement all parts of the Directive. (Interview, Ström)

The Swedish position at this early stage was that the Swedish legislation was sufficient since it was possible to apply it in conformity with the Directive. Even though there was some room for flexibility, not uncommon in the Swedish legislative tradition, the Directive was in fact followed. (Interview, Abresparr)

The Commission did not agree and considered the measures reported after the second package meeting as insufficient. Therefore, a formal procedure was initiated with the issuing of a Formal Notice in October 1999. (Doc. SG(99)D/8646)

4.2 Formal phase

In the response to the Formal Notice the initial approach by Sweden changed. The Government admitted the inadequacy of the Swedish laws by expressing that it wanted to ensure that there would be no doubt that it fulfilled its obligations. Therefore, professor Bertil Bengtsson was appointed to investigate and by March

2000 present which changes should be made to the Swedish legislation. Minor changes had already been made as a direct response to the Formal Notice. (Doc. EMU1999/3051/R) Bengtsson's PM was presented to the Commission in May 2000 and the suggested legislative changes were to enter into force on 1st of July 2001. The approach taken in the PM was that the smallest changes possible should be made before the whole environmental legislation of Sweden could be revised. (Swedish Government, Ds 2000:29 p 3) The desire not to make large changes was however not a problem in the relationship to the Commission in the present case. (Interview Abresparr)

The Commission reacted to the changes and the PM by issuing a Reasoned Opinion on the 1st of August 2000. Regarding the changes already made it was held that in most cases these were not as far-reaching as they needed to be. From the PM the Commission concluded that *"[i]t is apparent that a number of changes are intended to be made to Swedish legislation in accordance with the Formal Notice, but the proposal has not yet been approved*." The opinions in the Formal Notice were then repeated. (doc. K(2000)1857) Actions were taken against four Member States at the same time all due to the "*extensive shortcomings in the national legislation sent by these Member States*" (Commission 2000c)

The Swedish response is strikingly short. It was held that the proposed legislation was sufficient to fulfil the Swedish obligations. If the Commission did not agree with this the Government invited it to comment on the proposal so that their opinions could be regarded in the legislative process. (Doc. 26.9.00)

In November 2000 Commission and Swedish Officials meet again for a package meeting where the legislative proposal was discussed. At this meeting the Commission made some comments on the proposal, which were included in a revised version sent to the Commission in December and then discussed at a meeting in Brussels in January 2001. The changes were further clarifications and direct references to the Directive. (Doc. EUM2000/2083/R) The Officials from DG Environment taking part in these discussions expressed that they were pleased to be invited to comment on the proposal, but also pointed out that what they said could not be regarded as the official opinion of the Commission. The aim of these discussions for Sweden was not to have the Commission say exactly what they wanted to see in the legislation but to hear how the responsible Officials in the Commission reasoned:

> *"If they have worries* [about the legislation] *then we know that it is this persons worries that will later on underlie the facts before the Commission when they make their decision. Then one has to understand what this Official's worries are and to explain* [the Swedish legislation] *so that we get a signal that he has understood and that we understand him – that we speak the same language so to say."* (interview Abresparr)[10]

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[10] "Har de lite bryderier så vet vi att det ju är den personens bryderier som sen kommer ligga som grund för underlaget för Kommissionen när de ska fatta sitt beslut. Så då blir det att förstå vad det är som är bekymret för

The Bill presented to Parliament refers directly to the opinions given by the Commission during these discussions. (Swedish Government, Prop. 2000/01:111 p 29) The Bill passed Parliament in May without any fundamental disagreement about its main parts. (Swedish Parliament, bet 2000/01:MJU18 and rskr 2000/01:248)

4.3 Referral to the European Court of Justice

At the same time as meetings about the Swedish legislations were held the Commission in mid-January 2001 decided to refer the matter to the Court. In its press release the stated motive for this is that "[w]*hile Sweden appears ready to make changes, these have yet to be adopted and notified*." (Commission 2001a) The explanation given to Swedish Officials from Commission Officials was that "*they could not defend a decision that the Commission would rest in the infringement proceeding against Sweden while they proceeded in the infringement proceedings against other Member States* […] *they could not motivate not to proceed since they have a obligation to act"* Swedish Officials on the contrary *"said that it was unnecessary* – [the Commission] *knew legislation was on its way – and would only created pointless bureaucracy in Court*"[11] (interview Abresparr)

The Swedish response to the ECJ was a concession that the Swedish legislation had been in breach of EC law. However, it points out that new legislation had already entered into force. (Doc.3.10.01)

The case did, however, not end with a ruling from the Court since the Commission withdrew its action. The reason for this, Swedish Officials were told, was that since its mission is to ensure a change in the national legislation it no longer had any reason to continue with the case even if it formally could choose to let the ECJ rule in its favour. (interview Abresparr)

4.4 Analysis

The conflicting element in the case was the meaning of the Swedish legislation. The Commission was throughout the process firm on the position that the Swedish

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den här tjänstemannen och pedagogiskt förklara så vi får en signal att han har förstått och vi har förstått – att vi pratar samma språk så att säga."

[11] "Då kunde de inte försvara ett beslut att Kommissionen i just överträdelseärendet mot Sverige skulle vila på hanen när man gick vidare mot andra […]De kunde inte motivera att låta bli då de har en skyldighet att agera. […] Medan vi hävdade att det var onödigt för ni vet ju att det kommer lagstiftning och det kommer bara skapa onödig byråkrati i domstolen."

tradition of not having strict and binding rules in the legal text could not be accepted. The three package-meetings took place not only before the formal process but also after the Reasoned Opinion. These and additional meetings between Officials aimed at gaining understanding of the other's position ("*to speak the same language*") i.e. to make the legislation less unclear and discuss possible solutions rather than bargaining the scope of obligations. (P5) The actual Swedish legislative proposals were even sent to the Commission for comments. This shows that the proceedings entailed much more communication than formally required (P2) and that the Commission showed a great interest in the quality of the process and the problems faced by Sweden (P1) supporting the Bargaining approach.

These discussions make the Commission's reluctance to await the changes, which they themselves helped to develop, intriguing. They could not or did not wish to solve the question "amicably" by offering additional time to let the national legislation, already decided on when the case was lodged before the Court, enter into force. (P3) The Commission must have been certain that changes were coming, still, the principle that all Members had to be treated equally obligated them to go to court. (P4) If the Commission in horizontal attacks against multiple Member States is tied this way, then the possibility of a bargaining is severely reduced since the Commission does not have anything to offer. It also shows that discussions to solve problems do not preclude the fact that it is the results that count. It further indicates that the interest in the implementation process by Officials can be hard to translate into real effects on the formal procedure also rendering the "give and take" of bargaining difficult.

The fact that the application was withdrew when the legislation had entered into force could, on the other hand, mean that the Commission considered that it would suit its objectives to use the referral as an additional pressure on Sweden. (P3) However, the mission of the Commission was completed, which could defend a withdrawal towards other States, and there was, thus, no need for a formal judgement. I lean towards the interpretation that it was due to the equal treatment of Member States that the referral was made and not primarily as a bargaining tool.

Overall, the case shows that the Commission takes a problem-solving approach. This attitude does however not always translate into a "giving" of for example a less speedy advancement of the case. The case could be solved more amicably with the same material outcome if the Commission had not been "obligated" to refer the matter to Court. There is nothing indicating that two-level game could contribute to the explanation of this case.

5 Taxation of wine and beer

The third case in my study is not regarding an incorrect application of a Directive but an infringement of article 90 of the EC Treaty. This article forbids Member States to impose higher taxes on goods from other Members than on similar domestic products and to impose taxes on products of other Member States that indirectly protects domestic products. This means that a Member State cannot levy different taxes on products that compete if one is produced domestically and the other is not. In 1983 the ECJ held that the lightest and cheapest wines could be said to compete with beer. (ECJ, C-170/78) In 1997 Sweden lowered its tax on beer, but not wine, to reduce the price difference on beer between Sweden and Denmark partly to protect domestic producers of beer. (Swedish Government, prop. 1996/97:1:195-8)

5.1 Initiation of the procedure

After receiving a complaint the Commission on 29th of February 2000 sent a Formal Notice to the Swedish Government. Since approximately 90% of beer consumed in Sweden is domestically produced whereas 70% of the wine is imported from other Member States the Commission held that the difference in tax after 1997 was protecting domestic producers by crystallizing the consumption habits in Sweden. These claims were based on investigations conducted by the complainant. (Doc. SG(2000)D/101890)

Because of a prior action against Ireland the Swedish government was not surprised by the proceedings. Swedish officials working with related issues had in meetings with Commission officials heard that an infringement procedure was under preparation but no discussions regarding the tax took place before the Formal Notice. (interview Fernlund) The Swedish opinion before receiving the Notice was that the tax should not be lowered due to public health concerns. (Mellgren, 22.10.99)

5.2 Swedish response and negotiations

Swedish Officials, however, held a tax-cut to be necessary from the beginning (interview Fernlund) and upon receiving the Formal Notice Bosse Ringholm, Minister of Finance, at an EU-meeting on the 22nd of March, stated that the tax was to be lowered. (Lindgren and Olsson, 23.3.00) The Government stated in its

formal response that it was ready to consider a tax-cut on wine but not until the Budget was presented in September 2000. (Doc. Fi2000/1187)

This new Swedish position to make a promise to change but still not take a firm position at the moment could be related to the issue of alcohol imports. When entering the Union, Sweden was allowed to limit private import of alcohol during a transitional period ending 1st of July 2000. The Commission held that on this date all restrictions would be taken away automatically while the Swedish government wanted to renegotiate the exception. (Olsson, 6.3.00) After Sweden had ensured the Council's support the Commission on 13th of March agreed to find a compromise that would allow for a gradual removal of the transition rules. The Commission presented the rules for this to the Council in late May. (Wolmesjö, 14.2.00 and 26.5.00) According to Fernlund, then responsible Official for both the wine-taxation and the negotiations on imports, the later was much more important. Therefore, "*as long as these negotiations continued* [Sweden] *did not want to argue about related issues*." However a tax-cut could not find support domestically at this moment so a change was not possible. (interview Fernlund)

5.3 First Budget negotiation

The Swedish government did not receive any response from the Commission until after the presentation of the Budget. End of October the Commission sent a letter requesting Sweden "*to inform* [DG Tax] *about the latest development in this case*". (Doc. DG TAXUD A/3 D(2000)10730)

During the budget negotiations in Sweden the issue had been discussed extensively. In the Budget-proposal sent to the Left Party and the Greens, Ringholm, included a tax-cut on wine. The social democratic government was dependent on support of these two parties, both opposed to a tax-cut, in budgetary issues. (Billger, 27.8.00) Following the proposal, Lars Engqvist, Minister of Social Affairs, in an interview stated that there would not to be any change in taxes on alcohol before the government had presented its Alcohol-policy in October. (Silberstein and Ericsson, 26.8.00) With both members of the own Government and the partners in the budget coalition against him, Ringholm during the negotiations stated that the issue of wine taxation "*does not have to be decided today or tomorrow*." (Idling, 29.8.00) This way, the contentious issue was taken out of the Budget negotiations and the two disputing ministers agreed that the question be addressed through the Alcohol-policy. (Swedish Government, prop. 2000/01:1 p 235) However, the Greens argued that a tax-cut this close after negotiations would be contrary to the Budget agreement and threaten the cooperation. (Mellgren, 13.9.00) The Alcohol-policy did not entail any tax-cut and referred the question to the next Budgetary negotiations to take place spring 2001. (Swedish Government, prop. 2000/01:20 p 39-41 and Idling and Melsted, 11.10.00) The response given in November 2000 to the Commission's information-request was that the Government intend to return to the question in these spring negotiations. (Doc. 20.11.00.)

5.4 Second Budget negotiation

Before the next round of domestic budget negotiations, Ringholm, again promised to lower the tax. (Mellgren 14.3.01) The two coalition parties did still oppose a tax-cut and the result did not entail any change in the taxation of alcohol. The 3rd of April an Official at the Ministry of Finance stated: "*at the moment there is no proposal to cut the tax*." (Mellgren 4.3.01)

According to newspaper reports Ringholm, during the budget negotiations, contacted Bolkestein, the responsible Commissioner, to ask if and when the Commission planed to bring the matter to the ECJ. The reason for this was according to Ringholm that *"[i]f the question ends up in the ECJ it can decide on a much larger cut than the [one] we had in mind, Therefore, I want to avoid that it ends up there."* (Melin, 30.3.01) According to Fernlund, there was not a direct question. What Ringholm did was to explain the domestic situation to the Commission, which was that the proposal would not pass if there was not a risk of a referral to Court and "*[t]his risk would not have been credible if the case did not proceed.*" (interview Fernlund)

At a meeting between the Member State's Ministers of Finance on the 20th of April, Bolkestein stated that he intended to take Sweden to Court if there was no change and Ringholm's direct response was that if this was the case the tax would be lowered. (Wettergren, 21.4.01 and Mellgren, 21.4.01)

The Reasoned Opinion based on the same information as the Formal Notice was delivered on the 19th of June. (SG(2001)D/289254) The next day, a Bill was presented to Parliament. (Swedish Government, prop. 2000/01:144) The legislation lowering the tax on wine 18.8% was approved by Parliament in October 2001 and entered into force on the 1st of December. (Doc. 17.12.01) Both the Left Party and the Greens supported the bill, even if the Greens' spokesperson stated that they did so against their will. (Swedish Parliament, protocol 2001/02:21 at § 5 anf. 17)

Swedish Officials had recommended a larger tax-cut and held it to be unlikely that the decided tax-cut would satisfy the Commission. Three factors was however important for the proposal. Firstly, there was a possibility that the Commission would in fact be satisfied. Secondly, it gave the government additional time. Thirdly, the opposition from other political parties influenced this minimalist approach. (interview Fernlund)

5.5 Renewed procedure

After analysing the new legislation the Commission held that the tax-cut was not sufficient and issued a new Reasoned Opinion in July 2002. Even if the situation had improved the difference in tax between beer and wine was still too large. (Doc. SG(2002D/220497)

There was still an unwillingness to change the taxes in Sweden and Officials had therefore been given the task of reviewing the calculations that the Commission relied on and challenge their arguments, which led to a new approach that can be seen as more confrontational. (interview Fernlund) Firstly, the statistics presented by the Commission were questioned and the government instead argued that in relative terms the sale of wine had increased more than that of beer since 1997. Secondly, a new way of calculating the difference in taxation that shows that the tax on wine in fact is lower than on beer was introduced. (Doc. Fi2002/2634)

For nearly two years the case was at a standstill until the Commission in June 2004 decided to send a new Reasoned Opinion in which it was held that there was indeed a tax-gap that decreased potential sale of wine i.e. the sale of wine would rise even more if the tax-gap was not there. (Doc. SG(2004)D/202797) There has been no explanation to why the case did not proceed for two years communicated to Sweden, but it is probably due to the low priority given to the case in Brussels. (interview Fernlund)

The final Swedish response was that there would not be any further tax-cuts. (Doc. 7.10.04) According to Fernlund, Sweden could say "no" to the Commission since the cost of a referral to Court was not high. The financial implications were not large and there was still unwillingness towards the change in Sweden. Compared to other cases, especially a state-aid case against Sweden regarding energy-taxation (case N156/2004), both sides showed little interest in negotiating, probably due to the small financial implications of the issue. (interview Fernlund)

The case was referred to Court by a decision taken only 11 days after the Swedish response (Commission 2004) where it still remains undecided.

5.6 Analysis

The Conflict in this case is the level of tax required by EC law, a question that could be open for direct bargaining. A bargaining interpretation of the case would hold that the Swedish tax-cut was a proposed compromise. The Commission did however not accept this and was firm in its position supported by the ECJ. Swedish Officials were not surprised by the rejection of this "settlement". The Bargaining approach can, however, better than the Judicial approach explain why Sweden took the chance of proposing legislation it did not believe satisfied the obligations. Interestingly, Fernlund points to a connection between how much money is involved and the willingness to negotiate even the precise requirement of EC law. (P5)

There were no meetings to discuss the issue, not even before the formal procedure was initiated even if both parties were aware that a procedure was on its way. However, there were informal contacts even at Ministerial/Commissioner level about the domestic political situation. (P2) The Commission showed willingness to await Swedish legislation. (P3) Twice it accepts that a decision on the matter was postponed to the next budgetary negotiations. According to

Fernlund, the Commission is increasingly aware of the sensitivity of alcohol-related issues in Sweden and more understanding about the fact that changes can take longer in this field. (interview Fernlund) The Commission sent its Reasoned Opinion after being informed about the domestic situation and it could be claimed that it reacted on the governments problems and thus showed interest in the process and not only outcome of the implementation. (P1) The Reasoned Opinion was thus delivered more at a time suitable for the Commission than speedily after the first and second "wait-and-see" response from Sweden. (P3)

There is, at least from the Swedish side, a clear link to another issue in the case. (P6) Swedish Officials feared that the infringement procedure could have negative effects on the relationship with the Commission in related negotiations. Whether, this fear was motivated or not is impossible to conclude from this study. It is, however, interesting that the Commission is conceived of as relating infringement procedures to other political issues and that this link probably made the Swedish position more "amicable" compared to their opinion before the Formal Notice, as proposed by the Bargaining approach.

From a two-level game perspective the Swedish government's win-set can be said to be too limited to find an agreement with the Commission during the first round of Budget negotiations. It is not the lack of a parliamentarian majority that determines the win-set but the position of the Government's coalition partners. At this stage there is no attempts to link the two levels directly and it is not even communicated to the Commission that the "non-ratification" depends on its "tied hands".

At the second round of domestic negotiations the Government informs its international counterpart of the domestic problems and by issuing a Reasoned Opinion the Commission changes the domestic situation. Knowing that a referral to court would probably lead to more far reaching tax-cuts the Left and the Greens reluctantly approve a change. The Government can be said to threaten the coalition partners by going to Brussels to press through the change it had already accepted itself. Through the two-months dead-line in the Reasoned Opinion the Government makes sure that the question cannot be postponed to the next Budget negotiations and is therefore not as dependent on the Budget-coalition on the issue. It is however impossible from this study to draw the counterfactual conclusion that the Commission would not have acted as it did if the domestic situation was not discussed and taken into account.

As a concluding remark the outcome of a referral to court can be described as a negotiation failure due to the lack of a "zone of possible agreement" or overlapping "win-sets" even after the Commission had helped to change the Swedish win-set. It is however apparent that both parties tried to come to a solution through "giving" (of more time and a partial change) and "taking" (the postponing of change and firmness of interpretation).

6 Conclusions

In the infringement procedure we can find traces both of a political- and a judicial process with the Commission as negotiating party and "prosecutor" respectively. For the "give and take" of bargaining to take place both parties have to be able to do both. The usefulness of the Compliance bargaining approach in describing the procedure therefore depends on the amount of discretion used by the Commission not only to "take" by bringing proceedings against non-complying States but also to "give".

The three cases described and analysed shows that even if the stages and general framework of the infringement procedure are the same, each particular case proceeded differently and supports different propositions. The Compliance bargaining approach would explain this by the difference in distribution of bargaining power in the different cases and the differences can in itself be taken as a support for this approach by pointing to certain flexibility.

The question that has to be addressed here is whether the propositions drawn from the Compliance bargaining approach are found in the empirical study? The answer differs between the cases, propositions and even stage of the procedure. In the Wine-case there is evidence in favour of the Compliance bargaining approach regarding each of its six propositions. On the contrary, the Bathing water-case in the stages between the Formal Notice and Judgement give support to the judicial approach, whereas the case as a whole also can be interpreted as a bargaining where the Commission held a very firm position during these stages. In all three cases the Commission has shown some degree of willingness to find a solution out-side the formal procedure. The advancement of the formal procedure and the problem-solving dialogue is however not always used in a coordinated manner. In the Habitat- and probably the Bathing water-case a more amicable solution could have been found had the Commission chosen to make only a small "offer". This disregard of the Swedish willingness to comply without a court referral, motivated by the requirement of equal treatment of Member States, is one important factor speaking against the Compliance bargaining approach. Another is the firm position in regards to the scope of the obligations under EC law in all cases. However, this can be explained by the strong bargaining power of the Commission relating to the interpretation of law, especially given the case law from the ECJ in the cases studied. Also, there is some indication in the Wine-case that the Swedish government hoped to find a compromise in this regard. Overall the question opening this paragraph and thus the primary question of this study have to be answered in the affirmative.

The Compliance bargaining approach, however, has problems describing all the factors of the cases and needs to be developed to explain the differences. The

most important finding to develop the approach is that the bilateral understanding of the procedure is insufficient to explain specific cases. Firstly, the case studies indicate that the Commission's discretion and thus possibility to "give" something in the bargaining process is limited where action is taken against a number of States and the Commission is "*obligated*" to treat these alike. Even if this could tie its hands and strengthen its bargaining position it can also, if Sverdrup (2004) is correct in claiming that some Member States are more consensus orientated than other, lead to less than optimal bargaining outcomes by creating irritation and less incentives for Member States to seek consensus. When applied to particular cases the Commission's behaviour would have to be assessed from all procedures involving related issues. To investigate this the relevant case for a future case study should be a particular directive rather than a particular infringement procedure. Sverdrup's hypothesis combined with my findings also lead to the interesting question, important not least for the Commission it-self, of how it can adapt to the different traditions of problem solving in the Member States.

Secondly, as shown in the Bathing water-case the Government does not have full control over compliance. In suggesting that Member States strengthen their bargaining power through their unilateral control, the Compliance bargaining approach overestimates the power of the actual negotiator, the Government. Furthermore, with constitutionally independent sub-national bodies it is in some cases hard to claim that there is a conflict between the Member State and the Commission, which is a requirement for bargaining.

Thirdly, the Compliance bargaining approach acknowledges that being taken to Court involves a political cost of being seen as non-cooperative for States at the EU-level. However, the approach must also take the domestic political costs into account to be able to explain outcomes. In the Wine-case for example the Swedish government chose the "BATNA solution" of a referral to Court due to the *domestic* political costs of opposing its strategic partners.

Finally, in the same case there is an indication that the Commission's bargaining strategy can change the domestic bargaining of ratification and that this can be exploited both by the Commission itself and national governments. The last two arguments can easily be linked to two-level game theory and as we have seen this theory can help to explain particular infringement procedures. Two hypotheses, inspired by the findings in the two-level game analysis, are worth considering when applying the Bargaining approach. Firstly, a relevant domestic constituency critical to the specific EC-legislation will decrease the Commission's bargaining power by lowering the State's cost of non-compliance. Secondly, without considering the political situation as an excuse for non-compliance, the Commission can take this into account in its bargaining tactics and respond to it in the infringement procedure.

The hypothesis put forward by Fernlund, that the scope of EC-law is more negotiable when the issue at hand has large financial implications would also be interesting to develop in a future study. Moreover, the differences in my cases indicate that this can be transferred also to political implications. The relatively strong support for the bargaining approach in the more politically sensitive Wine-

case could point to the formulation of a “common sense” hypothesis that more politically sensitive questions will be solved through more political bargaining and more technical and politically unimportant issues through a more technocratic or judicial approach. This might also explain why Sweden seemed more successful in getting a response from the Commission towards its *politically* tied hands in the Wine-case than to its *administratively* tied hands in the Bathing water-case.

The last 20 years the EU expanded to new areas in a pace that cannot be realistic to expect the coming years. Therefore, I would predict that more effort will be put on making States comply with the already existing laws than develop new, making more research on the infringement procedure more pressing. In addition to what is said above about future research I hold the effects of Enlargement, giving the Commission even less time to deal with each implementation measure, as the most important research topic at the moment. What makes both this issue and the whole monitoring aspect of European Governance intriguing is that it could develop the procedure both towards more ”negotiated/political” *or* “automatic/judicial” solutions.

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Letter to the European Commission signed by Anders Kruse, 26.5.00. ”Kompletterande svar till motiverat yttrande rörande genomförandet av direktiv 76/160/EEG om badvatten”

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Letter to the Commission signed by Anders Kruse, 17.12.01. “Kompletterande svar på motiverat yttrande angående Sveriges beskattning av öl och vin”

Fi2002/2634, 18.9.02. ”Ang kompletterande formell underrättelse om oförenligheten mellan gemenskapsrätten och Sveriges beskattning av öl och vin”

Letter to the Commission signed by Anders Kruse, 7.10.04. “Svar på kompletterande motiverat yttrande med anledningen av oförenligheten mellan gemenskapsrätten och Sveriges beskattning av öl och vin”

Interviews

Abresparr, Egon. 18.4.05. This structured interview regarding the Habitat and Bathing water-case, took place at the Ministry of Sustainable Development in Stockholm. Abresparr is at the Legal Service of the said Swedish Ministry and was involved primarily during the early stages of the procedure of both cases.

Blücher, Magnus. 18.4.05. This structured interview regarding the Habitat and Bathing water-case, took place at the Ministry of Sustainable Development in Stockholm. Blücher is at the Legal Service of the Ministry (“Kanslirå̊d”) and has been working with the two cases primarily at the later stages of the procedure.

Fernlund, Carl-Gustav. 28.4.05. This structured interview regarding the Wine-taxation case was conducted over telephone. Fernlund is Justice of the Administrative Supreme Court in Sweden, but was until the end of 2004 at the Ministry of Finance (Finansråd). He was at this position responsible both for the Wine-taxation case and the negotiations about private import of alcohol.

Kruse, Anders. 11.5.05. This semi-structured interview was primarily aimed at getting a enhanced understanding of package-meetings. Some clarifications on the procedure in general was also made during this interview over telephone. Kruse is responsible for the European Law Unit (ERS) at the Swedish Foreign Ministry and as such responsible for package-meetings between Sweden and the Commission.

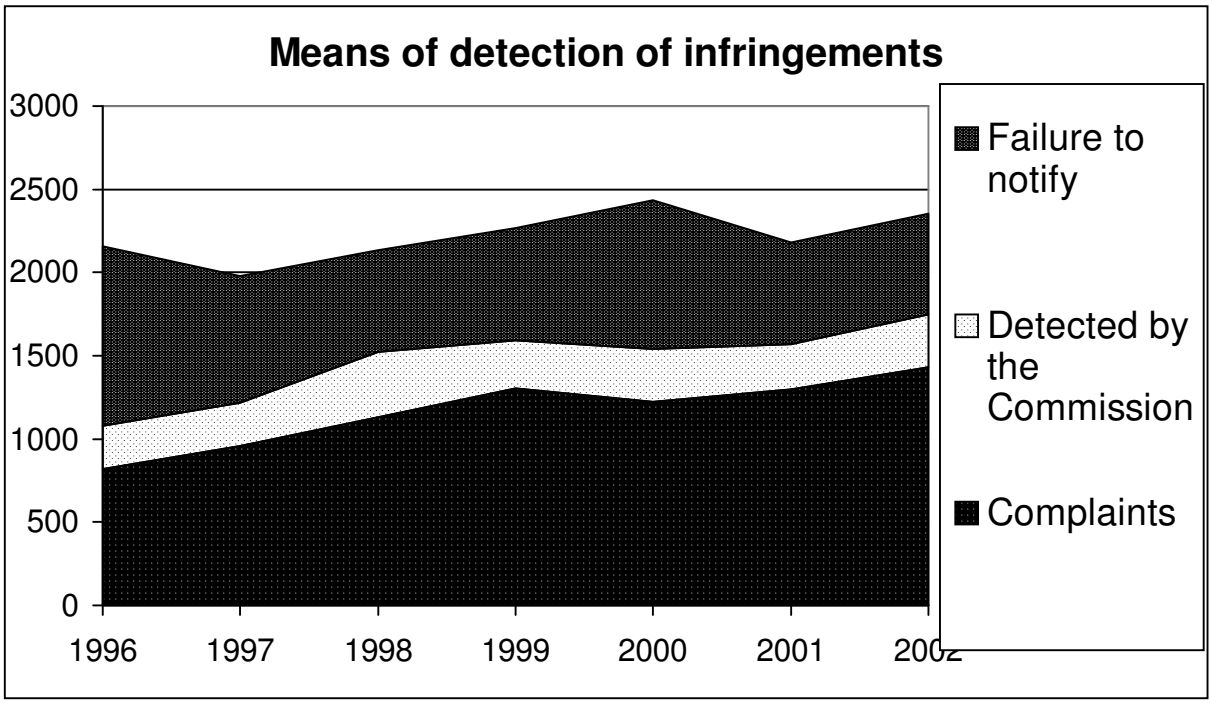
Norman, Kerstin. 31.1.05. This early semi-structured interview conducted over telephone was aimed at gaining a better understanding of the infringement procedure. Norman is Official at the European Law Unit (ERS) at the Swedish Foreign Ministry coordinating infringement proceedings against Sweden.

Ramstedt, Maria. 14.2.05. This semi-structured interview held at the Swedish Representation to the European Union was conducted to gain a better understanding of the procedure and the role of Swedish Officials in Brussels.

Ström, Lena. 16.2.05. The interview conducted at the Berlamont-building in Brussels was both semi-structured to give a enhanced understanding about the procedure in general and the working of the Commission and more structured to hear Ström's opinion on the Habitat-case. Ström is Official at the Legal Service at the Commission and works as such with many of the infringement proceedings against Sweden.

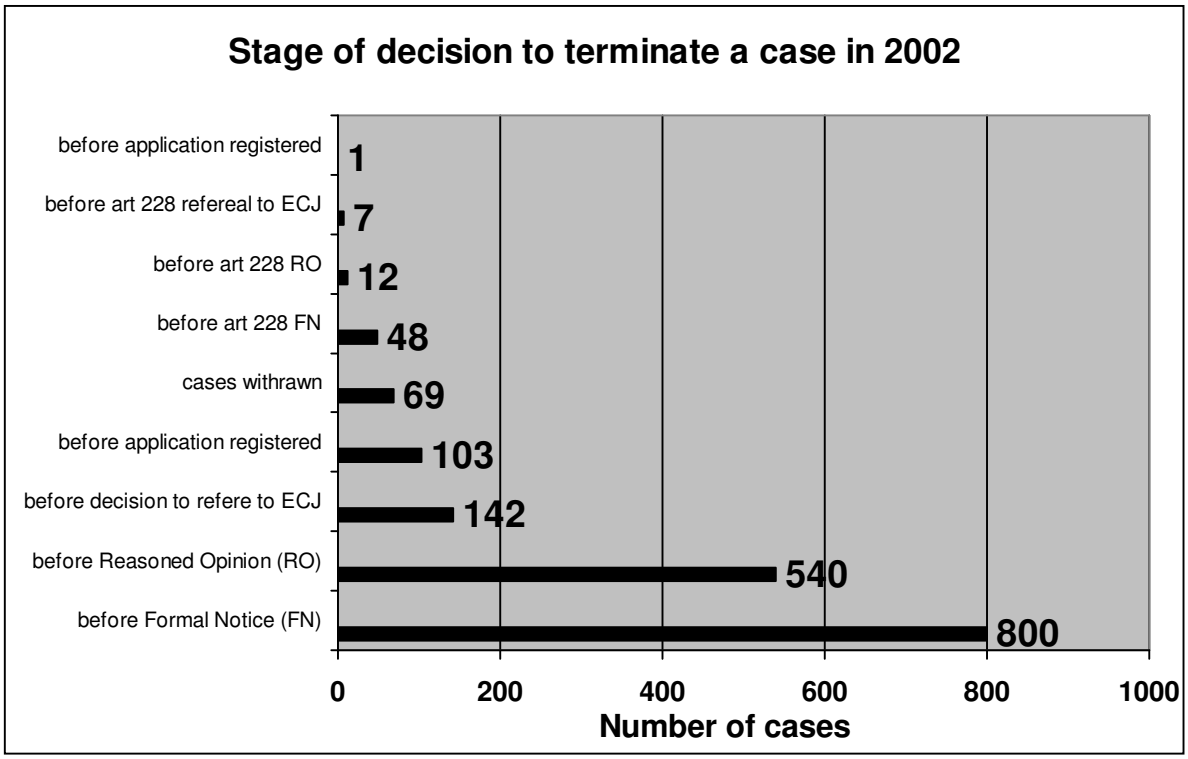
Appendix

Graph 1



Source: Commission 2003b

Graph 2



Source: Commission, 2003b